

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

R.F. and J.F. as Parents
and Nearest Friends of N.F.

V.

C.A. NO. 06-257

WARWICK SCHOOL DISTRICT

MEMORANDUM OPINION AND ORDER

GOLDEN, J.

DECEMBER 21, 2006

Plaintiffs R.F. and J.F., as parents and nearest friends of N.F., appeal the decision of the Pennsylvania Special Education Due Process Appeals Review Panel ("Appeals Panel") under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. Before the Court is a request by the Plaintiffs to supplement the administrative record.

Before considering Plaintiffs' request, it is useful to view the law pertaining to providing a disabled child with an education under the IDEA. States receiving federal education funding under the IDEA must provide every disabled student within their jurisdictions with a "free appropriate public education" ("FAPE") gauged to the needs of the student in the least restrictive educational environment. 20 U.S.C. §§ 1412(a)(1) and 1412(5). Under the IDEA, "[t]he core of

this entitlement is provided by the Individualized Education Program (“IEP”), the package of special educational and related services designed to meet the unique needs of the disabled child.” Carlisle Area Sch. V. Scott P., 62 F.3d 520, 526 (3d Cir. 1995) (citation omitted). An IEP is a written statement which must include:

1) a statement of the child’s present levels of educational performance; 2) a statement of measurable annual goals, including benchmarks or short term objectives; 3) a statement of the special education and related services to be provided for the child; 4) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class; 5) a statement of how the child’s progress toward the annual goals will be measured.

Kristi H. v. Tri-Valley Sch. Dist., 17 F.Supp. 2d 628, 630 n.2 (M.D.Pa. 2000); see also 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.347. Moreover, the benefit must be “meaningful” and the IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the child’s “intellectual potential.” Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999); Polk v. Cent Susquehanna Intermediate Unit 16, 853 F.2d 171, 184-85 (3d Cir. 1988); see also Bd. of Educ. V. Rowley, 458 U.S. 176 (1982). A child’s IEP is continually assessed by an IEP team comprised of the child’s parents, special education teachers, and other members of the school district familiar with the student. 34 C.F.R. §§ 300.344, 300.346.

Parents who are dissatisfied with their child's IEP are entitled to an "impartial due process hearing." 20 U.S.C. §1415(f) (IDEA). At that hearing, the parents have the burden of persuasion to show that a school district's IEP is not legally sufficient. See Schaffer v. Weast, 126 S.Ct. 528 (2005). In Pennsylvania, a hearing officer conducts an initial hearing. The party aggrieved by the decision of the hearing officer may appeal to a state educational agency such as the Appeals Panel. Id. §1415(g). The Appeals Panel "conduct[s] an impartial review...[and] make[s] an independent decision upon completion of such review." Id. A dissatisfied party may appeal the final judgment of the Appeals Panel by filing a civil action "in a district court of the United States." Id. § 1415(i)(2)(A).

When reviewing the decision of the Appeals Panel, the district court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determine is appropriate." Id. §1415(i)(2)(C). "This has been described as a 'modified de novo review,' or as 'involved oversight'" by the district court. Susan N.v. Wilson Sch. Dist., 70 F.3d 751, 758 (3d Cir. 1995) (quoting Murray v. Montrose County Sch.Dist., 51 F.3d 921, 927 (10th Cir. 1995)). Under this standard, we are not "free to substitute [our] own notions of sound educational policy for those of the educational

agencies [we] review.” Id. at 757; see Rowley, 458 U.S. at 206.

Rather, we must give “due weight” to the state administrative proceedings. Susan N., 70 F.3d at 757. We may make our own findings by a preponderance of the evidence. 20 U.S.C.

§1415(i)(2)(B)(iii); Shore, 381 F.3d at 199. Generally, however, “factual findings from administrative proceedings are to be considered prima facie correct.” Shore, 381 F.3d at 199 (citing S.H. v. State-Operated Sch. Dist. Of City of Newark, 336 F.3d 260, 271 (3d Cir. 2003)). If we as the reviewing Court “fails to adhere” to these findings, we are “obliged to explain why.” Id. We are not bound to follow the Appeals Panel’s conclusions of law.

In the case sub judice, N.F. is a 12 year old boy who suffers from severe autism. N.F. was adopted from a Romanian orphanage when he was two and a half years of age. In September of 2003, the Defendant offered the Plaintiffs an IEP which the Plaintiffs accepted on an interim basis. The Plaintiffs subsequently sought a Due Process Hearing to challenge the appropriateness of the IEP and to obtain compensatory education for the may hours of service that N.F. allegedly did not receive between December 2001 and September of 2003.

Due Process Hearings were held on September 17, 2003, September 22, 2003, October 22, 2003, November 14, 2003 and November 21, 2003. On December 6, 2003, the hearing officer

concluded that the Defendant had offered N.F. a free appropriate education in the September 2003 IEP, but had failed to offer him appropriate services between the December 2001 through October, 2002 and the summer of 2003. Accordingly, he ordered the District to provide N.F. with an appropriate amount of compensatory education.

Both parties filed timely exceptions to the Appeals Panel on December 22, 2003. On January 21, 2004, the Appeals Panel upheld the Hearing Officer's decision that the IEP was appropriate , but eliminated almost all of the compensatory education award. This appeal followed.

On Appeal, Plaintiffs contend the Appeals Panel erred by failing to apply the applicable standards for calculation of compensatory education and by failing to apply the relevant criteria to a consideration of the appropriateness of the IEP. Plaintiffs now seek to supplement the administrative record with the following documents and testimony:

- 1) A [Pennsylvania Department of Education] Intensive Interagency Initial Report dated December 2, 2003 which summarizes the District's complaint that its request in October 2003 for interagency involvement in assisting with N.F.'s programming had not been honored, that N.F.'s staff had resigned, and that N.F.'s behavior was too aggressive to be managed under the existing IEP and placement.
- 2) Two letters from the District's counsel dated December 5 2003 and December 8, 2003, which further describe the danger in which N.F. and all staff and peers in the classroom find themselves, the urgency of the need to

obtain Cordero¹ status for this case, and the District's agreement to utilize the services of an internationally known autism and behavior specialist, Dr. Richard Foxx, to reconfigure the IEP.

3) [Notice of Recommended Education Placement] of January 16, 2004 changing NF's placement from the school based program to "instruction at home" with consultation by Dr. Foxx.

4) Testimony from N.F.'s father, Dr. R.F., describing N.F.'s escalating dangerous behaviors in school and the inability of the staff to educate him under those circumstances.

See Plaintiffs' Letter Brief of July 12, 2006 at 2-3.

Plaintiffs point out that these documents and testimony are limited to a four-month period subsequent to the development of N.F.'s IEP and are essential to prove that the IEP had no chance of being successful.

The Defendant opposes Plaintiffs' request to supplement the record, claiming that since all of the proffered documents and testimony post-date the administrative hearing and the time the IEP was prepared, this Court's review of them would amount to nothing more than second-guessing the school district with the wisdom of hindsight.

The Third Circuit has held that "[e]vidence of a student's later educational progress may only be considered in determining whether the original IEP was reasonably calculated to afford some

¹ Cordero v. Pennsylvania Department of Education, 795 F.Supp. 1352 (M.D.Pa. 1996).

educational benefit.’” Susan N. v. Wilson School District, 70 F.3d 751, 762 (3d Cir. 1995) (quoting Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1040 (1993) (Garth, J.)). The Third Circuit cautioned that the district court must not engage in “Monday Morning Quarterbacking” in evaluating the appropriateness of a child’s IEP. Id.

The Court believes it would be beneficial in resolving this appeal to have before it the additional information Plaintiff proposes to submit. In keeping with the instruction of the Third Circuit, the Court’s review of this additional information will be narrowly construed to consider whether the original IEP was reasonably calculated to afford some educational benefit and not to engage in “Monday Morning Quarterbacking.” Further, in order to have all relevant information before the Court, Defendants may introduce the limited testimony of Jill Hackman, Fran James Warkomski and Dr. Foxx to counteract Plaintiffs’ submissions.

An appropriate Order follows.

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ORDER

AND NOW, this 18th day of December 18, 2006, upon review of the parties' letter briefs concerning additional evidence the Plaintiffs seek to present to the Court and the legal justification for admitting such evidence, it is hereby ORDERED that Plaintiffs may submit all of the proposed evidence contained in their letter brief as described in the accompanying Opinion. As requested in its response, Defendant may introduce the limited testimony of Jill Hackman, Fran James Warkowski and Dr. Foxx to counteract Plaintiffs' submissions.

BY THE COURT:

THOMAS M. GOLDEN, J.